No. 12283

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DOROTHY RAY HEALEY, MAX APPELMAN, ALVIN ABRAM AVERBUCK, ELVADOR G. GREENFIELD and HORACE MORTON NEWMAN, JR.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

POINT I.

Under the Circumstances of This Case Appellants Were Privileged Not to Answer Questions Put to Them Concerning the Membership Records of the Communist Party.

In its first point the government has fashioned a strange exception to the privilege against self-incrimination. "In their official capacity", it contends, officers of an unincorporated association "have no privilege against self-incrimination." (Appellee's Br. p. 19.) This generalization the government has distilled from certain cases dealing, first, with the principle that such officers have no privilege to

refuse to produce the records of their organization even where their contents incriminate the officers, and, second, with the extension of that rule to require such officers to identify as "genuine" the records produced. We shall show that the government has misapplied the authorities which it invokes and has fatally misconceived both the facts in the case and the nature of appellants' claim of privilege.

In this aspect of the case the government urges that the judgment below as to Healey must be affirmed for her failure to answer questions numbered (2), (10), (11), (12), (28), (30), and (31), as to Averbuck on questions numbered (3), and (9), as to Greenfield on questions (1) and (3), and as to Newman on question (11), (13), and (16). Central to the government's position is that these appellants were in fact officers of the Los Angeles Communist Party. There was evidence to the effect that Dorothy Healey was at a time prior to the proceedings below the organizational secretary of the Los Angeles Communist Party (see Appellants' Op. Br. pp. 9-10). There is no evidence of any kind in this record that appellants Averbuck, Greenfield and Newman held any office whatever in the Los Angeles Communist Party or any other subdivision of the Communist Party. The government's entire argument, therefore, utterly collapses as to Averbuck, Greenfield and Newman. Concerning Healey the government's evidence has never been admitted to be true by appellants, and when Healey was asked whether she was in fact the organizational secretary of the Los Angeles Communist Party she claimed her privilege [R. 65, 306]. There remains to be examined only whether Healey was privileged not to answer the questions specified above.

The government first relies upon a series of cases[1] holding that the officer of a corporation or unincorporated association is not privileged to refuse to *produce* records of the organization for the reason that the contents of the records might incriminate him. In each of these cases the question arose simply in terms of the *production* of the organization's records irrespective of the effect of the contents of them. These cases do not deal with the application of the privilege to *testimony* of the officer.[2]

This line of cases has no bearing upon the facts at bar. There is in this case no issue concerning a refusal to produce records. Appellant Healey was not held in contempt for refusing to produce records. And Dorothy Healey has not asserted her privilege against self-incrimination to excuse or justify a refusal to produce any records.

Healey was originally subpoenaed as an individual and merely to testify. During the course of her interrogation she was directed by the grand jury to produce certain records of the Los Angeles Communist Party [R. 68, 69, 70]. She responded that she did not then, and never did, have such records [R. 69, 70]; that she did not then, and never did, have control over them [R. 70, 71]; that she was not in charge of them [R. 69, 70] and never had

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[1]*United States v. White,* 322 U. S. 694, 88 L. Ed. 1542; *Wilson v. United States,* 221 U. S. 361, 55 L. Ed. 771; *Dreier v. United States,* 221 U. S. 394, 55 L. Ed. 784; *Brown v. United States,* 276 U. S. 134, 72 L. Ed. 500; *Hale v. Henkel,* 201 U. S. 43, 50 L. Ed. 652; *United States v. Watson,* 266 Fed. 736.

[2]In *Hale v. Henkel, supra,* a collateral question was raised as to the right of the corporate officer to refuse to testify upon claim of privilege for the corporation. The court pointed out that the witness could claim the privilege only for himself and then disposed of the case on other grounds.

been [R. 71]; and that such records were not "made by somebody who works under [her] direction" [R. 71]. The court below considered the government's motion for an order compelling Healey to answer the grand jury's questions as also a motion for an order compelling her to produce the documents in question, and, *sua sponte,* took the latter off Calendar [R. 248].[3] The presentment [R. 15, 17-20] charged Healey only with refusal to answer questions, and it is upon this alone that the judgment below rests [R. 40].

The government, then, derives no support from cases dealing with the naked production of records of an organization, for this problem is not in the case at bar. The second support for the government's thesis that officers of organizations, in their official capacity, have "no privilege against self-incrimination" is derived from cases dealing with efforts to compel testimony from such officers in connection with their production of the organization's records. The cases will not bear the extravagant claims made by the government.

It is true that where the officer has produced the records of his organization he may be compelled to give testimony "auxiliary to the production." But such testimony extends only to identification of the documents, "to declare that the documents are genuine" (*United States v. Austin Bagley Corp.* (2 Cir.), 31 F. 2d 229, 234).

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[3]Immediately after her first appearance before the grand jury Healey was served with a subpoena *duces tecum* directing the production of books and records of the Communist Party. She made a return to the grand jury stating her inability to comply because she did not have possession, control or custody of, or access to, the records [R. 307]. The proceedings below and the judgment in contempt are in no wise predicated upon the failure to comply with the subpoena.

Such testimony is essentially a part of the act of production which is not privileged (*United States v. Lay Fish Co.* (D. C., S. D. N. Y.), 13 F. 2d 136, 137; *United States v. Illinois Alcohol Co.* (2 Cir.), 45 F. 2d 145). These cases of course have no application to the instant case because Healey had not produced records, and had not been asked to declare them "genuine."

But once the officer is called upon to go beyond identification the privilege applies notwithstanding that in his "official capacity" he is testifying concerning the affairs of the organization in which he participated ("in his official capacity") and concerning the records produced. At that point he can in the language of *Wilson v. United States,* 221 U. S. 361, 55 L. Ed. 771, "decline to utter upon the witness stand a single self-incriminating word" (221 U. S. at 385, 55 L. Ed. at 781).

This court has so ruled in connection with a union officer who produced union records upon a grand jury subpoena and then was asked whether a signature upon a contract (included in the documents produced) was his and whether he had participated in the negotiation of that contract. On these matters this court ruled the witness had his privilege (and consequently earned immunity by his testimony) because the testimony was more than mere identification and touched upon the witness' connection with the transactions for which he was later indicted. "That the contract on its face may have been lawful . . . or that the defendant signed it in an official capacity cannot be said to destroy his immunity as an individual in all circumstances." (*Lumber Products Assn. v. United States* (9 Cir.), 144 F. 2d 546, 553.)

In the words of the government the testimony in the last cited case was "concerning books and records of an

unincorporated association" (Appellee's Br. p. 26) and was given by an officer in his official capacity and about his activities in that capacity. But nevertheless the privilege was held to apply. This court has therefore rejected the government's position. So also has the Seventh Circuit, *United States v. Molasky,* 118 F. 2d 128.

In *United States v. Daisart Sportswear, Inc.* (2 Cir.), 168 F. 2d 856[4] the court rejected the idea that a corporation officer testifying concerning his activities as such has no privilege. There the officer appeared pursuant to a subpoena *duces tecum,* reported that the corporate records were unavailable and then testified concerning the corporation's activities. In upholding his claim of immunity in part[5] the court observed:

> "The Government maintains that, since the questions asked went to what the corporation did, rather than to what Smith had done, he relinquished no privilege in testifying, and hence was not entitled to immunity. It is clear, however, that his answers, at least in part, incriminated him, and to that extent he must be granted immunity. It is true a corporate officer may be compelled to produce corporate records even though they tend to incriminate him, Wilson v. United States, 221 U. S. 361, 31 S. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D 558, and may even be compelled to testify as to the genuineness of corporate documents, United States v. Austin-Bagley Corporation, 2 Cir., 31 F. 2d 229, certiorari denied Austin-Bagley Corporation v. United States,

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[4]Reversed in part on other grounds *sub nom., Smith v. United States,* 337 U. S. 137, 93 L. Ed. 1264.

[5]The Supreme Court upheld it *in toto, Smith v. United States, supra.*

279 U. S. 863, 49 S. Ct. 479, 73 L. Ed. 1002. Yet we do not believe that the principle of the Austin-Bagley case, *supra,* may be projected so that a corporate officer may be compelled to testify as to any and all phases of the corporation's activities, without at the same time obtaining a grant of immunity for the incriminating matter he is compelled to disclose." (169 F. 2d at 861-862.)

The government's contention that corporate officers who testify concerning the corporation's records enjoy no immunity was given searching examination in *United States v. Goldman* (D. C. Conn.), 28 F. 2d 424. There officers of a corporation appeared and produced corporation records before a grand jury and testified concerning those records. After indictment they asserted immunity by plea in bar. This the government resisted on the ground that they testified as corporate officers concerning corporate records and therefore had no privilege. In rejecting this position the court fully answered the government in the case at bar:

> "It is true, as the government asserts, that these men testified only as corporate officers and not as individuals. It is difficult to measure the *quantum* of significance in this assertion . . . The rule which regards a corporation as a juristic person does not fuse the officer into the corporation. Nor is it legally permissible to extract incriminatory testimony from an individual upon the claim that his evidence is not being produced by himself, but by a cog of the corporate mechanism. (P. 433.)
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> * * * * * * * *
>
> "That they testified as corporate officers begs the question, and who can say but what their testimony

> enabled the government 'to ferret out the facts' necessary to complete its case against these defendants. That being so, the court should not deny them the immunity guaranteed by the provisions of the act." (P. 434.)

A similar result has recently been reached by the California District Court of Appeal (Third Appellate District) in the case of *McLain v. Superior Court*.[6] McLain had been subpoenaed as chairman of the Citizens Committee for Old Age Pension, a corporation, to produce designated records (including cancelled checks) before a legislative committee and to testify. He produced the records, was sworn and testified. The committee told him that he was subpoenaed only in his capacity as chairman of the corporation. Since the committee was investigating alleged bribery of an assemblyman, McLain testified that he had segregated the cancelled checks payable to the assemblyman and then handed them to the committee. It was held that McLain could and did testify only as an individual and that his segregating, identifying and handing the checks to the committee constituted testimony, which the court summarized as follows:

> "Here are four checks; they are cancelled checks of the Citizens Committee for Old Age Pension; they were drawn and made payable to Assemblyman John W. Evans; they cleared through the Committee's bank account; they are for $75.00 each; they are dated

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[6]Decided August 21, 1950. The opinion is not yet reported. The citation will be furnished as soon as available. If there is no official report of the decision by the time of oral argument herein, copies will be furnished the court at that time.

January 27th, February 25th, April 8th and April 15, 1949; my name appears as drawer for the Committee; I was then the Committee's Chairman of the Board of Trustees."

Having been indicted for the transactions so revealed, McLain was held to have incriminated himself and thus was entitled to statutory immunity.

It would be difficult to find a case wherein the line between production and identification on the one hand and testimony concerning the individual officer's activities subject to the privilege on the other, is more tenuous. But, since the identification of the cancelled checks was in fact testimony concerning not only the records of the corporation but also the participation of McLain in the transactions, the privilege was held to apply:

> "Here the subpoena was directed to the corporation and to petitioner as chairman of the board of trustees thereof and it required the production of the books and records referred to. However, when petitioner was sworn he became a witness pursuant to the *ad testificandum* part of the process served upon him. Indeed, there is no way in which a witness can be sworn otherwise, although, as has appeared from the statement of facts, there was a prompt declaration by counsel for the committee that petitioner had been subpoenaed merely in his capacity as chairman of the board of trustees of the corporation and not otherwise. That position was departed from when to him there was administered the usual oath administered to all witnesses. The situation may be illustrated by inquiring how a sentence for contempt would have been served had the petitioner after the administration of the oath proved contumacious. Clearly, he would have served that sentence individu-

> ally and not as chairman of the board of trustees. If, therefore, after the production of the books and papers in response to the subpoena *duces tecum,* by which production the demands of that process had been met, the petitioner, in response to appropriate questions, gave testimony touching the facts and acts for which he now stands under indictment, no reason appears why he should not have the immunity granted him by the statute in exchange for his constitutional privilege against self-incrimination."

It is therefore accurate to say that whenever the testimony of the officer touches upon his individual activities and knowledge, even as a corporation officer he has the benefit of the privilege. The cases, then, destroy the government's contrived thesis. Officers of organizations have no privilege to refuse to produce and identify records of their organization. But beyond that, they have their privilege as any other individual, and this privilege applies when they testify "in their official capacity," and "concerning books and records" of their organizations, and concerning their activities "in their official capacity." The only test is whether their testimony connects them individually with incriminating transactions.

But in any event, the government's argument wholly misapprehends the basis and nature of Healey's claim of privilege. She has not claimed her privilege by way of refusing to produce records of the Communist Party, for she was not ordered to produce any. She has not claimed her privilege not to answer questions seeking authentication or identification of such records since none were

produced. Thus the cases dealing with the application of the privilege to the production of records of an organization and to testimony "auxiliary to the production" cited by the government do not reach the problem here.

Dorothy Healey fears incrimination under the Smith Act (18 U. S. C. 2385, 371) growing out of association with the Communist Party. The facts upon which the reasonableness of this fear is predicated are summarized in our opening brief. (See especially pp. 13-19.) In short, the national leaders of the Communist Party had been indicted and were on trial (and have since been convicted) of conspiring "to organize as the Communist Party of the United States of America, a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence . . ." [II R. 327]; the same leaders were indicted for membership in the Communist Party knowing its purposes as just stated [II R. 331]. At the time these indictments were announced, the Los Angeles press carried stories to the effect that "local Federal attorneys indicated that the indictments may be the forerunner of a possible nationwide roundup of all American Communist Party members, or persons known to be associated in Communist activities" [Ex. D. Idf., II R. 335-336]. Other news stories told of Department of Justice plans to convene grand juries in named "key cities," including specifically Los Angeles, to obtain indictments against "well known Communists" [Ex. E. Idf., II R. 337, Ex. I. Idf. II R. 305-306]. At the opening of the grand jury investigation before which Healey was summoned, the government attorneys made statements to the press to the effect that the inquiry was "only the opening gun" of the govern-

ment's campaign against the Communists and that prosecutions would follow "if sufficient evidence is uncovered" [II R. 302, 304]. It thus appears from the "setting" adduced that any testimony indicating a witness' close association with the Communist Party in Los Angeles would create a substantial peril of prosecution under the Smith Act based upon membership in, or affiliation with, or aiding, or abetting, or helping to organize, an organization deemed by the government to advocate overthrow of government by force and violence. This is the more especially true since the announced plans of the Department of Justice and the statements of the prosecutors handling the inquiry indicated that such indictments might well eventuate from the very grand jury before which Healey was interrogated.

It is plain that answers to the questions here involved might give evidence of such an incriminatory association or at least give leads to such evidence. One would not know "who has the books and records of the Los Angeles County Communist Party" (question (2)); "whether or not the financial director would have a record of the dues paid by the members" (question (10)); whether "the membership or social director of each division have (*sic*) a list of the membership of that division" (question (28)); whether the membership director and the financial director have the books and records of the Los Angeles County Communist Party (question (30))—one would not know these things so as to be able to give competent and admissible testimony about them unless he had a close organizational relationship with the Communist Party. To admit to having such knowledge would provide a strong evidentiary link in the proof of association with the Communist Party culpable under the Smith Act.

Dorothy Healey, then, was called upon to give answers which might incriminate her as an individual. These answers would have come *not* from records or the identification of records, but from her own lips and concerning her own individual association with an organization which the government has denounced as a conspiracy in violation of the Smith Act. True, such testimony would have been, in the government's words, "concerning books and records of an unincorporated association" (Appellee's Br. p. 26), and it might have assisted the government in locating these records. But that testimony would have been mainly about Dorothy Healey and her connection with the Communist Party. It might have incriminated her in the same way that Ryan's testimony "concerning" the union contract and his connection therewith incriminated him in *Lumber Products Assn. v. United States, supra,* or Molasky's testimony "concerning" the corporation's records of financial transactions and his "knowledge" about them incriminated him in *United States v. Molasky, supra,* or the testimony of Pike and Comen "concerning" the corporate records incriminated them in *United States v. Goldman, supra.* That the testimony was or would have been "concerning" the organization's records is not the test. The issue turns on whether such testimony went beyond production and identification of those records and touched upon matters from the witness' own mouth which could reasonably incriminate him. In the case at bar the testimony sought from Healey was not asked in connection with her production or identification of records; it went solely to her knowledge of the internal workings of the Communist Party and might have been incriminating under the Smith Act.

POINT II.

Appellants Could Not by Operation of Law or the Honeyed Words of the Prosecution Have Obtained an Immunity Sufficient to Supplant Their Privilege.

A. Appellants Would Not Have Had Immunity by Operation of Law Simply as a Result of Answering the Questions Upon the Lower Court's Order to Do so.

The government contends that by answering the questions at issue upon the District Court's order, appellants would in effect have given coerced testimony which could never be used against them in any criminal proceedings, under the rationale of the forced confession cases (*McNabb v. United States,* 318 U. S. 332, 87 L. Ed. 819). *Ergo,* proceeds the government's disingenuous argumentation, appellants needed only to answer to obtain immunity.

It has long since been settled that protection against use of testimony in subsequent criminal proceedings is not immunity which is sufficient to supplant the privilege. The only immunity which is sufficient is one which prevents prosecution or the imposition of penalty or forfeiture with respect to any matter, transaction or thing concerning which the witness has testified (*Counselman v. Hitchcock,* 142 U. S. 547, 585-586; 35 L. Ed. 1110, 1122; *Brown v. Walker,* 161 U. S. 591, 594; 40 L. Ed. 819, 820; *Smith v. United States,* 337 U. S. 137, 146-147, 93 L. Ed. 1264, 1271-1272).

It is doubtful enough that had appellants answered they would have given testimony which could not have

been used against them. In all probability they would have simply waived their privilege. One who claims his privilege must make "a last ditch stand . . . He must refuse to answer or produce and test the matter in contempt proceedings or by habeas corpus" (Judge Fee in *United States v. Johnson,* 76 Fed. Supp. 538, 540-541). At all events, appellants would not have gained the immunity which the cases require as a precondition to foregoing their privilege.

B. Appellants Were Tendered No Valid or Effective Offer of Immunity by the United States Attorney and the Special Assistant to the Attorney General.

The government contends that the above named officials offered appellants immunity "in the broadest and most complete way possible" (Appellee's Br. p. 46). But they had no authority or power to make such an offer and it was a complete nullity. Immunity can be created only by statute (*Mulloney v. United States* (1 Cir.), 79 F. 2d 566, 578; *United States v. Kaplan* (2 Cir.), 7 F. 2d 594; *United States v. Pleva* (2 Cir.), 66 F. 2d 529; *Mattes v. United States* (3 Cir.), 79 F. 2d 127; *United States v. Johnson,* 76 Fed. Supp. 538).

The prosecutors in the case at bar did not purport to act under a statute and the government in its brief points to none. There is no such statute applicable here. No immunity was offered or conferred.

At best the prosecutor can promise not to convict in return for the testimony of an accomplice. But this con-

fers merely an equitable right to an executive pardon, enforceable only morally. A prosecutor's promise or tender of more is without authority, and void. (*The Whisky Cases,* 99 U. S. 594; 25 L. Ed. 399; *United States v. Levy* (3 Cir.), 153 F. 2d 995.) This equitable right, morally enforceable, does not dispense with the privilege:

> ". . . but we do not find any authority, and none is cited to us, in which such an equitable right to executive pardon, if the witness states fully and fairly the truth, has ever been held to do away with the constitutional privilege not to give evidence against himself, if he chooses to claim it. See Whisky Cases, 99 U. S. 594. It is a mere quity after all, not dependent upon a positive statute, and commensurate only with the full and fair revelation by the witness of the entire truth. If such an equitable exemption from further prosecution affects the constitutional privilege secured by the fifth amendment, then it is difficult to see why the same argument might not have been made in the Counselman Case." (*Ex Parte Irvine* (C. C. Ohio), 74 Fed. 954, 964.)

POINT III.

Appellants Faced a Real and Immediate Risk of Prosecution From Answers Which Might Connect Them With the Communist Party.

The totality of the setting which made connection with the Communist Party perilous for appellants is set out at pages 7-20 of Appellants' Opening Brief. One would think that the reality and immediacy of the risk of prosecution to appellants under such facts had been finally determined by this court's decisions in *Alexander, et al. v. United States,* 181 F. 2d 480, and *Kasinowitz, et al. v. United States,* 181 F. 2d 632, for the "setting" here was essentially the same as in the cited cases—differing only in showing the immediacy of the peril to these appellants. (See Appellants' Opening Brief, pp. 9-12, 14.) Since those decisions the Fifth Circuit has reached a similar conclusion in the case of *Estes v. Potter, et al.* (decided August 5. 1950).[7]

Conclusion.

The government has given this court no reason why its decisions in the *Alexander* and *Kasinowitz* cases should not be followed here. Upon the law there established the judgments below should be reversed.

Respectfully submitted,

MARGOLIS & MCTERNAN,
By JOHN T. MCTERNAN,
Attorneys for Appellants.

Dated Los Angeles, Calif., August 31, 1950.

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[7]Since the decision is as yet unreported, a copy is attached in the Appendix to this brief.

Opinion of the United States Court of Appeals.

In the United States Court of Appeals for the Fifth Circuit. No. 13,069, No. 13,112.

Fred Estes, Appellant, vs. Frank B. Potter, as United States Attorney, *et al.,* Appellees.

Appeals from the United States District Court for the Northern District of Texas.

(August 5, 1950.)

Before Holmes, Waller, and Borah, Circuit Judges.

HOLMES, Circuit Judge: This appeal is from a judgment that adjudicated the appellant to be in contempt of court, and sentenced him to imprisonment for thirty days and to pay a fine of one hundred dollars. The proceeding is one of civil contempt, which is not punishable by both fine and imprisonment for the same offense; but that does not preclude the court from imposing a fine as a punitive measure and imprisonment as a remedial measure, or vice versa. Sec. 401 of the New Criminal Code, 18 U. S. C. A. 401; Penfield Co., etc. v. Security & Exchange Com., 330 U. S. 585, 91 L. Ed. 1117, 1124.

This case arises out of a statute that authorizes immigration inspectors to conduct examinations with reference to the right of aliens to be and reside in the United States. That statute was being invoked here; and the court below, upon application duly made, ordered appellant to answer certain questions, which he declined to do on the ground that his answers might tend to incriminate him. The questions sought to be elicited from appellant, if he knew, were whether certain aliens were Communists or had been active in the Communist party. These were pertinent and material questions, because

the appellee contends here that membership in such party, or communistic activity, aims toward the overthrow of the United States Government by force and violence, and such activity on the part of any alien is ground for exclusion or deportation.

The court below deemed frivolous the appellant's claim of immunity from giving testimony against himself. It said: "If one were asked whether he knew the general reputation of a horse thief, he could not say, 'I wont tell that, because it might incriminate me. I might, myself, be a horse thief.' There is no real logic in that position." Addressing the defendant, the court said: "If and when this court's judgment with reference to answering these questions is upheld, then that will continue to be the order, and you are liable to spend a long time in jail, when you ought to be a free man, and all in the world you have to do to be a free man is simply to answer, 'Do you know these aliens? Are they Communists? Do you know this man here? Is he a horse thiesf?' Do you see the point? Do you know this man here? Is he a preacher? Is he a lawyer? You can see how simple it is. There is nothing in that. So I find you in contempt, and sentence you to pay a fine of $100 and to remain in jail for thirty days, unless you purge yourself. The Marshal will take charge of him and he will stand committed until that fine is paid and the sentence served."

We cannot agree that the matter is so simple. The answers to these questions in themselves may not have even tended toward the incrimination of appellant, but they may have been links in a chain of circumstantial evidence strong enough to convict him of a number of crimes; or such answers might well provide the means

whereby such evidence could be discovered. Appellant's claim of privilege rests upon a reasonable fear of prosecution under 18 U. S. C. 2385, and the general prohibition against conspiracy to commit an offense against the United States, 18 U. S. C. 371. The offenses defined in the foregoing statutes include at least the following:

(1) Knowingly or wilfully advocating the overthrow of the government by force or violence;

(2) Knowingly or wilfully abetting such advocacy or such overthrow;

(3) Organizing a society, etc., which teaches, advocates, or encourages the overthrow of government by force or violence;

(4) Helping or attempting to organize such a society;

(5) Becoming a member of any such society knowing its purposes;

(6) Affiliating with any such society knowing its purpose; and

(7) Conspiracy to do any of the foregoing.

If the answers to the questions might tend to show that the appellant was a member of or affiliated with the Communist party, his fear of criminal prosecution was justified. There is no statute that makes it a crime to be a member of the Communist party, but the very object of the investigation to which the appellant was subpoenaed was to ascertain whether the aliens in question were members of or affiliated with the Communist party and, therefore, subject to deportation under 8 U. S. C. 137, subdivisions (e) and (g) of which provide for the deportation of any aliens who are members of or affiliated with any organization, association, society,

or group, that believes in, advises, advocates, or teaches, the overthrow by force or violence of the government of the United States. We assume the appellee's position to be that membership in the Communist party by an alien comes within the ban of Sec. 2385 of the New Criminal Code, 18 U. S. C. 2385, and the deportation statute just cited. It is palpably inconsistent, in one breath, to urge that being a Communist is a ground for deportation for belonging to a group that encourages the overthrow of the government by force; and, in the next breath, to argue that it may not incriminate one to be compelled to testify that he is a Communist, knows Communists, or has attended a meeting of Communists. Yet, this seems to be the position of appellee; it would be idle merely to ask the witness if he knew the aliens and, upon his answering yes, then to stop his examination; and the law never requires the doing of an idle thing. The form of the question, "Do you know this horse-thief," would be objectionable, because it would imply that the defendant was a horse-thief.

Appellant was asked whether he personally knew the alien; if he knew whether said alien was a member of the Communist party; if he knew whether the alien contributed funds to the Communist party; if he knew whether the alien attended meetings of the Communist party, etc. He could hardly know whether the alien attended meetings without being present there in person, and evidence of appellant attending such meetings would tend to show that he was a Communist. Appellant was not asked concerning things that he might have heard or been told. He was not asked if he knew the alien's reputation for communistic activities. The distinction is a significant one. He could not know the crucial

things that he was asked about without furnishing a link in the chain of evidence that might be needed to convict him under the New Criminal Code, 18 U. S. C. 2385 or 18 U. S. C. 371. If affiliation with the Communist party is sufficient ground for deportation of an alien for the reasons urged, it is a reasonable ground for a citizen to fear a prosecution for conspiracy. If the appellant denies that he is a Communist, he may be prosecuted for perjury; if he admits it, he may be prosecuted for belonging to a group that encourages the overthrow of governments by force; if he declines to do either, he is "liable to spend a long time in jail, when [he] ought to be a free man." This is a perilous position for a citizen, who is presumed to be innocent unless the facts here are sufficient to adjudge him guilty of contempt.

The questions propounded to appellant do not disclose the incriminatory nature of the answers sought to be elicited, but appellant does not have to prove that his answers would incriminate him to be entitled to his privilege. If that were the nature of the burden, he would be forced to divulge the very facts that the immunity permits him to suppress. A witness need only show that his answers are likely to be dangerous to him. If in the circumstances it is reasonable to infer the possibility of incrimination from the answers that the witness may give, the privilege may be claimed. It is for the court to determine, in the first instance, whether incrimination is reasonably possible from any

answer the witness may give; but if such possibility exists, then the witness has the absolute right to assert his privilege, which extends to more than the admission of a crime or any element thereof. The privilege bars compulsory disclosure of any fact that tends to incriminate a witness. Counselman v. Hitchcock, 142 U. S. 547; Mason v. United States, 244 U. S. 362; In re Willie (United States v. Burr), Fed. Case No. 14,692e; United States v. Zwillman, 108 F. (2) 802, 803; United States v. Weisman, 111 F. (2) 260, 262; United States v. Cuson, 132 F. (2) 413, 414. It would be difficult to improve upon the strong and clear language of Marshall, C. J., in United States v. Burr, Case No. 14,692e, 25 Fed. Cases 38, at page 40:

> "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may incriminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege which the law allows, and which he claims. It follows necessarily then, from this statement of things, that if the question be of such a description that an

answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact. If the declaration be untrue, it is in conscience and in law as much a perjury as if he had declared any other untruth upon his oath; as it is one of those cases in which the rule of law must be abandoned, or the oath of the witness be received.

". . . Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description.

"What testimony may be possessed, or is attainable, against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

The judgment appealed from is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Judge Waller took no part in the final decision of this case.

A True copy: Teste:

(Seal)

OAKLEY F. DODD,
Clerk of the United States Court of Appeals for the Fifth Circuit.

By J. A. Feehan, J.,
Deputy Clerk.